



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

STATE HISTORIC PRESERVATION DIVISION
601 KAMOKILA BOULEVARD, ROOM 555
KAPOLEI, HAWAII 96707

COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
DEPUTY DIRECTOR - LAND

DEAN NAKANO
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

**OAHU ISLAND BURIAL COUNCIL MEETING
MINUTES**

DATE: WEDNESDAY, OCTOBER 12, 2005
TIME: 10:00 A.M.
PLACE: DEPARTMENT OF LAND & NATURAL RESOURCES
1151 PUNCHBOWL STREET, ROOM 132
HONOLULU, HAWAII 96813

ATTENDANCE:

Members: Van Horn Diamond, Chair
Alice Greenwood
Sydney Keliipuleole
Andrew Keliikoa
Kalei Kini
Kehaulani Kruse
Aaron Mahi
Mark Kawika McKeague
Jace McQuivey
Linda Kaleo Paik
Lynette "Nettie" Tiffany

Absent: Cy Bridges (Excused)
Charles Ehrhorn (Excused)
Analu Josephides (Excused)

Staff: David Brown, Archaeology Branch Chief
Piilani Chang, Cultural Historian
Sunny Greer, Cultural Programs Director
Vince Kanemoto, Deputy Attorney General
Susan Yanos, Secretary

Guests: Keala Norman
Halealoha Ayau
Paulette Kaonohi Kaleikini
William Aila

I. CALL TO ORDER & ROLL CALL

The meeting was called to order by Chair Diamond at 10:30 am. Verbal roll call was taken by Yanos. The majority of members were present and quorum was reached.

II. INTRODUCTION OF COUNCIL MEMBERS AND SHPD STAFF

(Mahi enters at 10:32 am)

Council members introduced themselves. Mahi did a *pule*. SHPD Staff introduced themselves.

III. OPENING REMARKS

Chair Diamond opened the meeting by stating that past, present, and future council members would all agree that these are the most challenging councils that members will ever engage in fulfilling a public purpose. Diamond thanked those that have served on this Council and noted that one of the things he has been pleased with is that this Council arrived at its decisions on its own. There is an engagement during the council meetings, among and between the Council members, and there is also an effort to try to glean information from the people who come to the meeting. Based on that, the Council makes its decisions. Diamond does not recollect that there has ever been a situation in which they were lobbying in order to produce an outcome. Diamond acknowledged that the Council is learning all the time and that some decisions may have been in error, but the Council learns from how the rules are interpreted by legal representatives and then adjusts its decisions.

Diamond thanked all council members, past and present, for the contribution to fulfilling the public purpose.

Diamond stated that over the course of time, some issues have not been resolved. He hopes that during the next year, some of these issues will be resolved. For example, the program that provides the administrative support and assistance to the Council has had a very difficult time receiving money and personnel to fulfill the function. The result of which has been an overload, and the consequences have been repeated legislative audits. When given the

opportunity to testify to the Legislature or when questioned by the Legislative Auditor, members of the Council have said that they cannot expect people to provide the kind of caliber staff services if the program is under-funded and under-staffed, because the process gets stalled just by the over-work. What the Council has also said to the Legislature with regard to the audits is there is a need for SHPD – in particular, the Burial Sites Program – to have core staff positions with regular civil service standing. So that if there are cut backs or any form of reduction in services, the positions that are core are the very last to be put in jeopardy. One of the criticisms that Diamond shared was that when looking at the SHPD's position count, there are more civil service exempt positions than regular civil service. Exempt civil service positions (employees) serve at the pleasure of whoever is the political appointee in addition to being the first ones to be cut when there is a reduction.

Diamond urged Council members to support SHPD in getting appropriate funding. Diamond underscored to the members that when they sit on this Council, they do not have to register as a lobbyist. Members can be called upon by the Legislature as a resource, or they can go on their own and testify.

Diamond also urged the Department and Council members to look at the staffing issues of SHPD. In 2003, there was an effort to provide core staff with regular civil service status to SHPD, but it did not pass because human resources at the overall level determined that that was not a high priority.

Diamond thanked SHPD staff, past and present, for the resources and support they provide to the Council. A lot of the things that Council does is a result of the information that is provided by the staff. Diamond acknowledged that at times, there have (and will be) disagreements and challenges between Council and staff but that it is not personal. He stated that the object is to find common ground and what the issues are.

In conclusion, Diamond drew the Council's attention to today's agenda, specifically to Item 5D. Diamond made it clear that he will not serve as chair of this Council after today's meeting. Diamond stated that he has one year left in his term, in which he does not think that there will be a reappointment.

Diamond pointed out that the next member to serve as chair needs to have at least four or five years of service in order to maintain continuity to the Council. Diamond also pointed out that the rules say that the chair serve for four years. Diamond stated that the rule was implemented when he was originally elected, and this month (October) is when that four years will expire. Diamond stated that he will always be available to the new chair and vice-chair to provide manao.

Diamond stated that the Council does not have a vice chair due to certain circumstances with the confirmation process. Therefore, the Council will be

voting to fill two positions.

Diamond called upon Deputy AG Kanemoto to speak about how meetings are to be conducted because there was a procedure that was adopted by the Council at last month's meeting.

Kanemoto reminded the Council that their meetings are open to the public and fall under the "Sunshine Law" (Chapter 92 HRS). In these open meetings, the public can attend and has the right to testify, orally or in writing. Kanemoto noted that these meetings only span part of a day during work hours. If the Council has a big agenda (and/or may have some controversial agenda items), there might be a lot of people that want to testify. Because the Council wants to give everyone who attends the meetings an opportunity to testify, sometimes it becomes necessary to impose a time limit on the amount of testimony that each individual can provide per agenda item. The only way this can be done under the Sunshine Law is for the Council to formally adopt a policy limiting the amount of time that an individual can testify. In accordance with that, the Council, at the last meeting, adopted the policy limiting the amount of time for testimony for each individual, per agenda item, to four minutes subject to extension by the Council chairperson based on input provided by the Council at large.

Diamond added that one of the things that Council asks for is respect—mutually extended and shared. He also asked that, when people come to speak or testify, the purpose of the testimony is to help the Council in its deliberations to make a decision. Therefore, the Council expects people who provide testimony to address their testimony to the Council and only to the Council. Diamond reiterated that the purpose of the Council meetings is to gather information vital to making decisions.

IV. APPROVAL OF SEPTEMBER 14, 2005 MEETING MINUTES

Correction by Paik; Page 4, Paik abstained.

Correction by Paik; Page 7, last paragraph " . . . the burials to be treated as previously identified so it would come to the Burial Council." (delete the word "not").

Kruse made a correction on Page 5, third paragraph, change spelling of "Kehokulole" to "Keohokalole".

Kini made a correction also on Page 5, same line as above, "Kealoha, Kuhea", delete comma "Kealoha Kuhea" (one individual).

McQuivey recommended that the modified motion on Page 3, because the initial motion was modified, be restated in bold to include "subject to extension by the

Council as determined by the Chair".

**Motion to accept the minutes with modifications was made and seconded.
(McQuivey/Paik)**

Discussion: Diamond asked Kanemoto if other typographical or grammatical errors were found later could be corrected or should Council note those at this meeting. Kanemoto replied that Council can notate it to staff.

Amended motion to allow Council to go back and modify any typographical or spelling errors with regards to the minutes was made and seconded. (McQuivey/Paik)

Kruse commented that the minutes were very well done; SHPD staff accepted comments with gratitude.

VOTE: ALL IN FAVOR.

Motion is carried. The minutes are adopted as amended and circulated.

No corrections were made to the executive session minutes of September 14, 2005.

**Motion made to adopt minutes of the executive session and seconded.
(Keliikoa/McKeague)**

VOTE: ALL IN FAVOR.

Executive session minutes of September 14, 2005, are adopted.

V. COUNCIL ACTIONS

**A. Discussion regarding appeals process on council decisions
[§6E-43(c), HRS and §13-300-51, HAR]**

Based on the orientation this Council received, it appears that the areas in which the appeal process is applicable is when the Council makes a determination to relocate or leave in situ pursuant to §6E-43(c). Historically, there have been two appeals on that issue. In the orientation that Council received, it identified only in situ and relocate. Diamond asked how the process was expanded to include more than those two areas.

Kanemoto explained that the Keanaaina family was recognized as lineal descendants to a broad range of specified remains that were disturbed at the Wal-Mart site. There was a challenge to that recognition and the

determination was made that it was a constitutional matter because it affected the potential practice of customary traditional native Hawaiian rights (cultural practices and rights). Kanemoto confirmed that §6E-43(c) does not include that as a category for which contested case hearings or appeals can be held. It was felt that because of the unique nature of the topic of the ruling or determination that was being challenged, the hybrid panel that is specified in §6E-43(c) would be more appropriate for hearing the appeal than a strict Chapter 91 process, which would be before the Board of Land and Natural Resources or an appointed hearings officer.

Diamond asked if what Kanemoto stated is referenced in the ruling rendered by the panel, because they would have to justify their decision. Kanemoto stated that he was not a part of the appeal, therefore, he did not know.

Diamond asked if there should have been a formal legal opinion from the Office of the Attorney General saying that this is a constitutional matter and warrants this kind of appeal process. Kanemoto replied that a legal opinion from the AG's office was not necessarily warranted because there are time constraints when appeals are made and the determination was made that it affected constitutional rights. Therefore, the petitioner in the appeal was entitled to some type of due process so the petitioner's concerns could be heard.

Diamond asked what the basis is of taking up the appeal at this point because until this case, there has only been an appeal in terms to relocate or in situ. Diamond feels that there should be a formal legal opinion to provide guidance to all councils relative to opening this up because in terms of precedent, what else will be subject to the appeal process?

Kanemoto replied that perhaps what needs to be done is for the statute to be amended to include that subject matter as being something that an appeal process needs to be applied.

Diamond stated that his reason for posing these questions was so that all island burial councils are aware that this establishes a precedent. We know that it could question lineal descendancy and cultural descendancy.

Kanemoto stated that the law draws a distinction between lineal and cultural descendancy, and the matter of cultural descendancy has not been considered yet. What was dealt in the Keanaaina appeal was lineal descendancy, and it was felt that because of the nature of lineal descendancy and how it affected the rights of others, including cultural descendants, under the law, the appeal was appropriate.

Diamond stated that in a letter dated June 10 to Peter Young, DLNR Chair, Diamond asked who represented the interests of the Burial Council in the

appeal process. The appeal case involved Kaleikini and Keanaaina, but the decision was made by the Council relative to the issue of lineal descendancy. So in that respect, who represented the interests of the Council because the decision was rendered by the Council.

Kanemoto stated that in the December meeting when the initial matter was decided by the Council, the Deputy Attorney General advising the Council was William Wyhoff and Kanemoto did not know what, if any, type of advice he provided to the Council. However, the matter came up on the agenda in January or February for clarification, and Kanemoto advised the Council at that time. Council made its determination as to recognition/non-recognition. When Kaleikini sought to appeal the decision of the Council, it was determined that the Council was not a party to the appeal—it was the Council's decision that was being appealed. So during the appeal, no one represented the interest of the Council because the Council was not a party in the appeal. The Deputy Attorney General Linda Chow advised the panel in that appeal.

Diamond understood that under the rules, the Department shall provide administrative assistance and support to the burial council to include legal representation, collectively and individually. He asked what is the administrative support and assistance to the Council when its decision is being questioned and challenged and Council is excluded from the process.

Kanemoto maintained that the Council would not be a party in an appeal, even if the appeal were a determination on preservation or relocation of iwi—the Council's decision would be the subject matter of the appeal. The staffing that Diamond talks about is only for the Council meetings, where the SHPD staff and the Deputy Attorney General provide support and resources for information on internal policies, procedures, the law, and questions relating to native Hawaiian burials. When there is an appeal, the Council is not a party in the appeal and is not represented.

Kanemoto explained that if two parties went before a judge in circuit court and the judge's decision gets appealed to the State Supreme Court, the two parties, the appellant and the appellee, would be the parties involved in the appeal. The circuit court judge would not be a party involved in the appeal; it would be that judge's decision that would be the subject matter of the appeal and the supreme court would receive briefs from the appellant and the appellee but not from the circuit court judge. So when the Council is making a decision at these meetings, it is acting as arbiters (quasi-judicial body) making a decision that is legally enforceable.

(Tape 1, Side B)

Diamond asked, "Who looks out for the Burial Councils' authority to protect it

so that it's only going after that particular decision in the appeal process?"

Kanemoto replied that what it boils down to is the law. The factual underpinnings that gave rise to the decision and under the applicable law, the decision was correct.

Diamond asked, "How does the Council achieve guidance during the course of the procedure?" Because if the Council believes itself aggrieved, it is entitled to separate legal representation provided through the Department to pursue it. Kanemoto again replied under the law the Council is not a party in the appeal process. Diamond responded that that is not what the rule says. Kanemoto said that the Council seeks advice from its attorney during its open meeting when it is making the decision which later becomes the subject of the appeal. Diamond said that the rules say that if the Council is aggrieved and feels the need to pursue it, it can only be pursued by going to court. When it goes to court, then the Council would need its own attorney. Diamond added that if Council had that legal guidance throughout the process, perhaps it would've been clearer.

Diamond also said that after the decision was rendered, he was asked by newspaper reporter Gordon Pang what Diamond thought of the decision. Diamond replied to Pang that he was disappointed, but he would wait until he saw a copy of the decision. Diamond said that he or any of the Council members never received a copy of the decision until the last Council meeting. Diamond stated that the rules say that the Council has ten business days if it is grieved to appeal it. How does the Council appeal if the deadline has passed? Diamond added that even if the Council didn't have the ratio, he thought that the Chair could have acted if the Council members agreed to be aggrieved.

Kanemoto explained that the way the hybrid panel was set up, the Chair of the council that made the decision is supposed to be on this panel. Diamond stated that he wrote a letter to Peter Young dated June 10 in which he indicated that Diamond did not believe that it was appropriate for the Chair of the Oahu Island Burial Council to sit on that particular panel because the Chair was a party to the decision that was rendered. Diamond felt that would have tainted the outcome, so he chose to withdraw.

Kanemoto stated that as he interprets §6E-43(c), the reason for the chair of the council that rendered the decision to serve on the panel is so the chair would provide the council's perspective on the matter.

Diamond said that on June 10, he asked for a formal ruling from the Attorney General whether or not Diamond could sit on that appeal panel (for the Kaleikini case). To this date, Diamond hasn't received a response to that letter.

Diamond recommended that in the event there is another appeal, the Council should have an orientation as to how exactly the appeal process works and what all the rules are so that the Council can make the kinds of decisions it needs to. Kanemoto stated that if, during an open meeting, the Council anticipates that a determination might be appealed, it can go into executive meeting and discuss the aspects of a possible appeal with the attorney staffing the meeting. During that time, the Council would receive all the advice that it is seeking on the matter. Kanemoto said that once Council makes its determination, particularly if the decision is preservation or relocation, then the matter falls into §6E-43(c) territory and then it becomes a simple matter of the appeal process as it is spelled out in the rule 351.

Paik felt that any decision the Council makes can be appealed. Kanemoto stated that §6E-43(c) gives the statutory right to appeal for determinations on preservation or relocation. In the situation where the decision on recognition for lineal descendancy was sought to be appealed, it was determined that there were constitutional rights involved, therefore, the appeal was appropriate. Kanemoto added that not every single determination or recommendation made by this Council is subject to appeal.

Paik stated that the State explained to the Council during orientation the meaning of lineal and cultural. The decision made by the appeal showed that the decision was in error because the Keanaainas could not prove their lineal descendancy. Paik felt that the Council cannot be overly cautious about every matter that comes before the Council. If the Council makes an error and a decision is appealed, she felt that the Council should just move on because the Council cannot possibly know everybody's genealogy. The Council just has to accept what is presented to them and make their decision. If the decision is an error and the families choose to appeal, that is in their right. She didn't think that the Council should feel that it needs to have legal representation.

Diamond stated that he was not questioning the decision relative to whether lineal descendancy was confirmed or not confirmed and that the decision was vacated. He is addressing the issue of process to make sure the next time it happens, it's clearer than before and the Council knows its role. He stated that this is the first time that there has been a decision in this area. Kanemoto added that an appeal was not addressed or not anticipated because §6E-43(c) does not talk about it.

Diamond stated that there have been two other cases that were appealed: one on Maui and one on the Hawaii Island. The Maui chair did not serve on the appeal panel; the Hawaii IBC chair also did not serve on the appeal panel. Diamond served in lieu of the Hawaii IBC chair and he could not understand why he was being chosen because that was not the practice.

In the process for the Hawaii IBC decision on relocation, the Hawaii IBC was brought on to provide information as a witness. In the Kaleikini-Keanaaina case, both parties agreed not to include anything from the Burial Council. Diamond added that Timothy Johns made the remark that he was going to base a lot of his decisions at the appeal process on the minutes of the proceedings.

Guest Edward Halealoha Ayau, Executive Director of Hui Malama I Na Kupuna O Hawaii Nei, commented that his understanding is that Council determinations are subject to appeal, specifically, Councils' determination to relocate or preserve in place. This Council submitted determination in identifying lineal descendants and his understanding was that was the basis for the appeal. It makes sense to Ayau that there are constitutional rights involved that supported that appeal.

Ayau commented on the concern that Diamond raised about who watches out for the Councils' interests on the appeals panel. He stated that Council chairs are included in the hybrid panel so that they could represent the Councils' interest. He stated that the panel was created to have three Burial Council chairs and three Land Board members. The Council chair of the council being appealed was not excluded from serving on the hybrid panel, but the previous two Council chairs felt the same way Diamond felt – they wanted to serve on the panel, but they thought it was better to sit it out.

Ayau expressed his concern about the timeliness of this issue being brought up. He stated that this issue should have been addressed in a timelier manner.

Ayau stated that the appeal is completed and a decision was reached. His question now is what will the OIBC do now so the burial can move forward? He stated that his family, the Townsends, were recognized as cultural descendants in that case, and they are waiting to be able to support the reburial of these kupuna. He urged the Council to do whatever it needs to do to make it happen.

Greenwood stated that Kanemoto mentioned at the last meeting the reason the reburial could not happen was because the AG's office was pursuing other things in the civil case. Kanemoto stated that because there was an on-going investigation/enforcement action which is expected to reach its conclusion soon and which may result in civil/administrative penalties being sought against certain entities, he could not disclose too much information. However, he did state that the reason the iwi have not been reinterred yet was because he and Deputy Attorney General Jay Page did not allow law enforcement investigators to photograph the iwi for evidentiary purposes because they felt it was highly inappropriate. Therefore, in the event there is a contested case hearing, the iwi needs to be available for evidentiary

reasons. Kanemoto stated that the Department shares the community's concern in reinterring as soon as possible, and the AG's office is moving as fast as they can so that the issue can be resolved as soon as possible.

Guest Paulette Kaleikini asked Kanemoto what kind of time frame they expected the investigation to be completed. Kanemoto stated that unless there was any follow up, the investigation was recently completed and was a matter of getting it to the Board of Land and Natural Resources. The Land Board will be the one who will consider whether or not violations occurred and what penalties, if any, are appropriate.

Kaleikini asked how long that process would take. Greer explained that the Office of the Attorney General conducts the investigation, then provides their information to the Department, and SHPD prepares the submittal to the Land Board. Greer stated that SHPD is waiting for direction from the AG's Office and does not know when they will be hearing back from them.

B. Discussion on appropriate Hawaiian organizations

[§6E-43.5(f)(5), HRS and §13-300-24(c), HAR]

Diamond stated that the Council has an applicant who is seeking to be recognized as an appropriate Hawaiian organization, Ha Na Leo O Hawaii. Paik thought that this Council discussed this issue before and Council does not determine who is appropriate; Council will just maintain a list.

Greenwood asked who decides that an organization is an appropriate Hawaiian organization; Paik responded that she didn't think it was the Council's purview to decide what organization is appropriate.

Kanemoto stated that under §6E-43.5(f)(5), it says, "the Councils shall maintain a list of appropriate Hawaiian organizations, agencies, and offices to notify regarding discovery of remains." So Paik is correct in saying that the Council maintains the list, not create the list. However, Kanemoto pointed out in subsection 3, the Council can make recommendations regarding any matter relating to native Hawaiian burial sites.

Greer stated that during the island burial council training sessions, this was one of the issues that was brought up. DLNR is in the process of preparing 2006 Legislative package and in that package the Division is proposing language to refer it back to what is stated in the rules because what exists currently is merely a definition, the task to maintain a list. Greer offered that perhaps the language should include "recognize and maintain". That way, it will be specified in statute that it is the kuleana of the Councils. Also, currently there is no mechanism for selection of an appropriate Hawaiian organization. The concern was all those previously-recognized appropriate Hawaiian organizations could be subject to legal challenge because the process in which they were selected is not specifically defined in statute or

rule. Greer suggested that the Councils discuss with their legislative representatives the possibility of submitting additional legislation separate from the Department's package.

Greer also pointed out that even though Oahu Council may have a list, would Oahu Council recognize Hawaii Island's list or another island council's list. These kinds of things may be subject to legal challenge. We need more clarification and that clarification needs to be specified in the law.

McQuivey asked if the Department is taking a position in recommending or if SHPD is just asking for comments. Greer replied that SHPD welcomes input and comment but they must understand that these are merely proposals not in final form.

McQuivey stated that the word "appropriate" leads you to think that the Council determines what is appropriate and what is not, however, it is not very clear. Greer agreed with McQuivey and also added that "an appropriate Hawaiian organization" is defined in the rules which is referenced in 13 300-2. Diamond pointed out that under the definitions, it states an appropriate Hawaiian organization means, ". . . a group recognized by the Council that is comprised of a majority of Hawaiians and has a general understanding of Hawaiian culture in particular, beliefs, customs and practices relating to the care of its ancestral and native skeletal remains, burial goods and burial sites." McQuivey said that definition is helpful, but it is not identified in the statutes. Kanemoto asked if this Council wants to amend the statute to state, "The Council shall recognize and maintain a list . . ."

Greenwood reminded the Council about the issue of showing documentation such as birth, death, and marriage certificates that would be exposed to the public. Descendancy claims are protected based on information given to the Department versus the recognition for appropriate Hawaiian organizations.

Diamond suggested that organizations that are deemed to be appropriate Hawaiian organizations be listed in the statute. There is one appropriate Hawaiian organization already in the statute and that is Hui Malama. Kanemoto stated that if you limit it to what's in the statute, then are you closing the door to any other appropriate Hawaiian organizations. Diamond said that's why he was posing that question, because if you establish the statute, then you're going to have rules. Kanemoto suggested that maybe the Department needs to adopt rules. If they can change the wording to say "recognize and maintain" in the statute, maybe the Department needs to adopt rules to establish a process the way you have rules talking about recognition of lineal and cultural descendants. Diamond asked why are rules necessary when the definition is very explicit. Kanemoto explained that what the rules process does for recognition of lineal and cultural descendant is it establishes a process. Thereby making it more difficult for someone to say

that the decision was arbitrary and capricious because you have specific articulable factors that go into the decision-making process. If you can spell out a process for the recognition and maintenance of a list for appropriate Hawaiian organizations, that would be the best-case scenario.

Diamond asked if it was possible for the Department and the Attorney General's Office to come up with some language for the proposal the Council would like to make and provide it to the Council for review at the next meeting so that it could be submitted with the Department's legislative package. Greer stated that she didn't know what the deadline was for the Department to submit the legislative proposals to the Administration. The Council could also offer proposed legislation through their legislators.

Discussion took place about how the Council should write up the proposal to change the language to state, " . . . recognize and maintain . . . "

McQuivey stated that he would be against a proposal like the one above because when drafting legislation, you need to cross-reference things and there's another defining term out there. He asked if the Council is sure that it wants to be the body to recognize appropriate Hawaiian organizations, and he felt that the Council should think about it thoroughly. He also stated that it should be consistently applied to all the councils. If each council has authority, we are going to end up with different lists. McQuivey felt the issue was more complicated than that and asked that maybe the Council define what are the things the Council wants and asked if this is really too difficult to do in this upcoming session. He stated that he wanted to do it right because the Council has to live with some of the difficulties of things being done quickly.

Diamond suggested another possibility would be to fund the study to have LRB do it and come back with their recommendations for adoption in the following session. That way, the Legislature is now stuck and it is their body that is making the recommendation of the definition and the input can come from the research and the input from everybody.

Kanemoto added that there are only certain entities that make recognitions – the Councils and the Department. Kanemoto suggested that since Ayau was present at the meeting, the Council asked him what was intended when it says "maintain a list". Ayau stated that the question of who should be the ones "recognizing" appropriate Hawaiian organizations was the subject of a lot of debate. He said that the response from the community was they wanted the councils making that decision because they represent the community. Ayau explained that the Council is supposed to represent the community and the large landowners – that was the balance. He added that culture is very important to the Hawaiian people, but having immense economic impact on landowners. The thought was to have both represent

the native Hawaiians on the Council and let the Council be the body that would make determinations on lineal and cultural descent and native Hawaiian organizations. He asked the Council not to give up that authority.

McQuivey stated that he would support the change to include "recognition" and suggested that this issue be presented to the other councils and have them agree with this Council that the language should be changed.

(Tape 2, Side A)

Council requested the staff to ascertain from the other councils whether they support the notion that the burial councils will retain the responsibility and authority to recognize appropriate Hawaiian organizations and will they be supportive of the required follow up.

C. Oahu Island Burial Council's role as possible claimants in the NAGPRA process relative to the "Forbes Cave," Kawaihae Ahupuaa, Kohala District, Island of Hawaii

Diamond explained that in 2000, the Oahu IBC was approached by some members of the community who could not afford to go to Hawaii island to achieve cultural descendancy for recognition relative to Kawaihae. These members asked Oahu IBC if they would provide representation at the Forbes Cave. The Council at that time voted "Aye". There was a follow up by staff to Bishop Museum, and Bishop Museum, at that time, verbally said "No". Recently, Diamond encountered someone from Bishop Museum who indicated that if the Council wanted to write a letter, they would reconsider and reopen the issue. Diamond asked the Council if anyone would be interested in keeping the issue open. Several members indicated that they would like to drop the issue. Diamond asked if there was any member who would object to dropping it; no one responded and Chair announced that the issue was officially dropped.

Chair called a five-minute recess at 12:10 p.m. The meeting resumed at 12:20 p.m.

D. Election of Chair & Vice-Chair

[§6E-43.5(f)(4), HRS, §13-300-24(e), HAR, and §92-9(a)(3), HRS]

Diamond asked for nominations for chair and reminded Council members that he is not available to be the chair.

Jace McQuivey and Charles Ehrhorn were nominated for Chair.

**A motion to close nominations for Chair was made and seconded.
(Paik/McKeague)**

VOTE: ALL IN FAVOR

Vote by roll call:

<u>Council Member</u>	<u>Voted For</u>
Greenwood	McQuivey
Keliipuleole	Ehrhorn
Keliikoa	McQuivey
Kini	Erhorn
Kruse	McQuivey
Mahi	McQuivey
McKeague	McQuivey
McQuivey	Ehrhorn
Paik	McQuivey
Tiffany	McQuivey
Diamond	McQuivey

Eight votes for McQuivey; three votes for Ehrhorn. Jace McQuivey is new Chair.

Chair asked for nominations for Vice Chair. Kini stated that he would like to remove himself from consideration because he had discussions with his department director (he is an employee of the Department of Budget and Finance) and she asked Kini not to be too proactive in his role in his deliberations.

Keliikoa also stated that he would like to remove himself from consideration for Vice-Chair because of his employment with the Board of Water Supply.

Paik suggested that Council members nominate people who will attend the meetings consistently.

Ehrhorn, Josephides, McKeague were nominated for Vice-Chair.

Motion to close nominations for Vice-Chair was made and seconded. (Keliikoa/Mahi)

VOTE: ALL IN FAVOR

Votes for Vice-Chair:

<u>Council Member</u>	<u>Voted For</u>
Greenwood	McKeague
Keliipuleole	McKeague
Keliikoa	McKeague
Kini	Josephides
Kruse	Ehrhorn
Mahi	McKeague
McKeague	Josephides
McQuivey	McKeague
Paik	McKeague
Tiffany	McKeague
Diamond	Ehrhorn

Seven votes for McKeague, two votes for Josephides and two votes for Ehrhorn. Kawika McKeague is new Vice-Chair.

VI. SHPD INADVERTENT DISCOVERY REPORT

A. Palehua Heiau, Honouliuli Ahupuaa, Ewa District, Oahu [TMK: (1) 9-2-05: 336]

David Brown reported that there was a burial call on September 23, 2005. Brown met Shad Kane, who is the overseer of the Campbell Estate lands above Makakilo, at the Palehua Heiau. The bone was identified as non-human. It was a cattle bone, a rear leg-bone.

Tiffany stated that Shad Kane is not a representative of Campbell Estate. He is involved with the heiau, but he does not represent Campbell Estate.

Tiffany suggested that a list of all OIBC members' contact number be distributed to the Council members in case they needed to contact another member. Greer pointed out that that information is private, but if the members are willing to share that information with their fellow members, SHPD would include that list in the next mailing. Greer stated that SHPD will provide the contact numbers of the members who are present at today's meeting on the list and staff will contact those who are absent to confirm with them that it is ok to include their contact numbers on the list as well.

Greer asked the Council for input on the new monthly Inadvertent Report provided to the Council in their packet. The Council said they appreciated the report and offered no revisions.

VII. ANNOUNCEMENTS

- A. September 2, 2005 U. S. Army letter and enclosures regarding unexploded ordinances surface and sub-surfaced clearance activities at combined facilities for Kahuku Training, Oahu, Hawaii [Enclosures: Archaeological Monitoring Plan and Cultural Monitoring Plan]**
- B. September 21, 2005 U. S. Army letter regarding remediate transformer oil in locations at Ft. Shafter and Ft. DeRussy**
- C. Advisory Council on Historic Preservation letter and enclosures regarding ACHP's Human Remains Policy Statement (September 2005)**

Diamond informed the Council that the above letters are Section 106 reviews. Around 2001, there was a workshop that several OIBC members attended and acquired some fundamental information about Section 106. As a result of that, the Council members that had participated formed a task force under the rules. The task force's job was to review Section 106 items and meet with staff (Archaeology and Burial Sites Program) to review the material, do an assessment, and report their assessment to the Council. The Council would then act on what had been evaluated. Given the kinds of things that are under Section 106, Diamond stated that that is the most reasonable way to complete the reviews.

Diamond drew the Council's attention to Item C above, which refers to something that came out of the Advisory Council on Historic Preservation, that's also the basis of Section 106. Section 106 is separate from NAGPRA, but it deals with iwi and artifacts. The Advisory Council set advisory policy, just like NAGPRA. On his initial review of the Advisory Council letter, Diamond noticed the policy statement regarding treatment of human remains and grave goods dated from New Mexico. At their advisory meeting, they adopted this as principles. Diamond read,

"Where scientific study is offensive to the descendants of the dead and the need for such study does not outweigh the need to respect the concerns of such descendants, reburial should occur without prior study. Conversely, where the scientific research value of human remains or grave goods outweighs any objections that descendants may have to their study, they should not be reburied but should be retained in perpetuity for study."

That is the policy position of Section 106. Section 106 applies to Striker Brigade. Diamond asked, "Is it in the interest of the Hawaiian community to have entities like burial councils to be involved in examining this kind of thing?"

Another thing Diamond noticed in his review, is that although they are inviting input from native Hawaiian organizations, in the specifics, it is conspicuous that they are not referencing native Hawaiian throughout and maybe it is because native Hawaiians are not recognized as native Americans. Diamond added that native Hawaiians have been invited to participate and as a participant you can add the fact that we want to include native Hawaiians in this issue.

Greenwood added that an archaeological monitoring plan and cultural monitoring plan was included as part of that letter. Greenwood stated that she was part of the Striker Brigade cultural monitors. There were 20 people that attended the training. When everything was ready to go, Greenwood asked the person to send in the monitors; the person said to wait (he wanted to play politics). As a result, eight of the monitors, including Greenwood, pulled out. In the 2005 Cultural Monitor List includes three kupuna who are 78 years old; one of them is dying of kidney failure and it is in that plan.

Diamond recommended that at the next meeting, the Council establishes a task force to review Section 106 items. The Council should discuss how it will be involved in evaluating and rendering its recommendations.

VIII. ADJOURNMENT

Tiffany noted that she was disappointed that she did not attend the training meeting held on July 7. She stated that she would have attended had she been notified. Also she did not receive her materials in time to attend. She encouraged the staff to provide as much notice as possible for all meetings. She commended the Department for organizing a training meeting as one had never been done before.

Before adjourning, Diamond thanked everybody for their participation at today's meeting. Diamond again thanked this Council, past and present, for the kokua that was provided to him. He also thanked those who have been privy to his health condition for their care and support. Diamond wished the new Chair and Vice-Chair all the eleleai of this Council for their continued good work.

Diamond said a pule kakou and adjourned the meeting at 12:57 p.m.

Submitted respectfully,

Susan P. Yanos
SHPD Secretary